United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1280

To Be Argued By
Frederick H. Block

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

JUAN RAMON VASQUEZ,

Appellant.

----------x

B p/s

APPELLANT'S BRIEF

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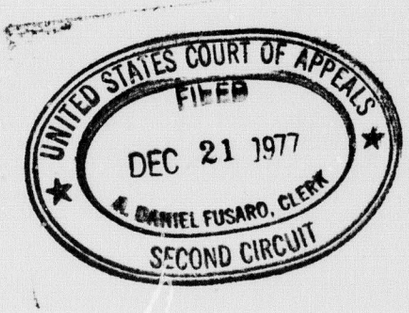
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
- x

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77-1280

JUAN RAMON VASQUEZ,

Appellant.
- x

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Should a new trial be granted because of the shocking inadequacy of appellant's court-appointed lawyer, particularly in light of (1) counsel's failure in connection with appellant's entrapment defense to call for the production of the confidential informant who was known to appellant; (2) counsel's failure to press for the testimony of co-defendants Reyes and Lugo

whose refusals to testify on Fifth Amendment grounds were frivolous; (3) counsel's failure to request an agency for the buyer charge; and (4) counsel's ineptness at cross-examination and ignorance of the applicable law?

Preliminary Statement

Vasquez appeals from a judgment of the United States District Court for the Southern District of New York (Hon. Lawrence W. Pierce, J.) entered June 6, 1977, sentencing him to 10 years imprisonment and 3 years special parole, following his conviction after a jury trial on charges of distributing and possessing heroin with intent to distribute the same under Counts 2-5 of the indictment, and with the crime of conspiracy so to do under Count 1 of the indictment. Vasquez is presently serving his sentence in Atlanta.

Statement of the Case

The Indictment

Count 1 of the superseding indictment (4a)*

*References unless otherwise noted are to the appendix as here, to the trial transcript (Tr. p.) and to the filed documents (doc. no.).

charged Vasquez a/k/a "Ramon Ramos" with having conspired to deal in heroin in New York City and Chicago with his co-defendants at trial namely, Colon (a/k/a Catina) and Narvaez; and with Reyes, Aurea Vasquez (a/k/a "Gloria Montalva" who is not related to appellant), Lugo, Urbina-Astorga and Agosto-Concepcion (a/k/a "Indio") all of whom pleaded guilty before trial.

Counts 2 to 5 alleged as substantive offenses against Vasquez and Reyes the sales of heroin in New York City on January 3, 7, 12 and 26, 1977 described in overt acts 2, 5, 8 and 10 of Count 1. It was alleged that the January 3rd sale took place at a bar on Avenue D, the January 7th sale at a restaurant at 24 5th Avenue, and the other two sales at Vasquez's apartment at 713 East 9th Street.

The Proceedings at Trial

On December 23, 1976 Detective Caracappa who was operating undercover as Frank Flacko (Tr. p. 690) was introduced to Vasquez on the telephone by a paid confidential informant (Tr. p. 50) known to Vasquez

as Fraticelli (Tr. pp. 687-690). Vasquez said he had heroin to sell and Caracappa told him he would be in touch. A few days later, on January 3, 1977, Caracappa was introduced to Vasquez in person by the informant. Vasquez then took Caracappa to a nearby bar in the East Village and introduced him to co-defendant Reyes. Reyes, in Vasquez's presence, sold Caracappa a one-half ounce of heroin for $750.00 (Tr. pp. 51-54). Three more purchases of heroin by Caracappa took place from Reyes through Vasquez on January 7th, January 12th and January 26th. The January 7th sale involving 4-1/2 ounces for $6300 took place at a bar on lower Fifth Avenue in New York City. The other two sales involving one ounce for $1500 and 1 pound for $22,400, took place in Vasquez's apartment at 713 East 9th Street in New York City (Tr. pp. 60, 70, 78).

Two days after the last sale and on January 28, 1977 at Vasquez's apartment, Caracappa introduced Detective Bruno to Vasquez as his cousin "John". A discussion then ensued about a large purchase of heroin

to be made in Chicago.

Thereafter and up until February 5, 1977 when a trip was made to Chicago, there were numerous recorded conversations with Vasquez and co-defendants Lugo and Aurea Vasquez about the proposed Chicago deal which involved a purchase of five kilos of heroin.

Thus GX 10A, 10B and 10C are portions of a conversation among Vasquez, Lugo and Aurea Vasquez at a dinner meeting held on February 1, 1977 at Francesco's Italian Restaurant on York Avenue in New York City at which the Chicago trip was discussed and at which Detective Bruno was wired for sound, (66 a); GX 14 is a transcript of Detective Bruno's telephone conversation on February 2, 1977 with Vasquez (who was called Ramon) at the home of Aurea Vasquez (who was called Gloria) (79 a); GX 18 is a transcript of Bruno's telephone call to Vasquez on the following day (78 a); GX 20 A-F are transcripts of portions of a tape recording of a meeting on February 4, 1977 in Vasquez's apartment at which Bruno was wearing a recording device

and at which Vasquez and Aurea Vasquez were present with the two detectives (102 a); and GX 22 is a transcript of a telephone call which Bruno made to Vasquez on February 4th (110 a).

Interestingly enough in connection with the recorded conversations, counsel, in apparent ignorance of the controlling statute, 18 U.S.C. sec. 2511 (2) (c) and such cases as Lopez v. United States, 373 U.S. 427 (1963) and Hoffa v. United States, 385 U.S. 293 (1966) had urged, vainly, of course, that the tapes should be excluded on constitutional grounds (Tr. pp. 116-125).

In any event on February 5, 1977 the two detectives, Caracappa and Bruno, flew to Chicago with Vasquez and co-defendant Aurea Vasquez to purchase the heroin (Tr. p. 148). Vasquez and Aurea travelled under aliases (Tr. p. 409, GX 7). According to Caracappa, Vasquez was to receive $1500 for making the trip but Bruno and Vasquez agreed that Vasquez was to receive some $5000 (Tr. pp. 91, 405, 705).

Upon arrival in Chicago the only thing Vasquez did was to stay in a hotel room with Detective Bruno (Tr. p. 450). In the meanwhile, Aurea Vasquez, in

the company of Caracappa and Agent Tucci, who was operating undercover as "Sal", was seeking a connection. She worked with Colon (Catina) and Astorga-Concepcion (Indio) to find the connection (Tr. pp. 163-156). However, immediately after the arrival of the party at the hotel room, Agent Tucci displayed for the group, including Vasquez, the $110,000 in cash he had with him for the proposed purchase (Tr. pp. 460-461).

The buy could not be made on February 6th when the New York detectives had to leave, so arrangements were made for Catina to contact Agent Tucci. Caracappa and Bruno and Vasquez and Aurea Vasquez returned to New York in separate planes (Tr. p. 169). Thereafter Urbina-Astorga was arrested with a substantial amount of the heroin involved in the proposed buy (Tr. p. 590).

The government's case included in addition to the principal witnesses Caracappa and Bruno, the aforementioned tapes and the testimony of Agent Tucci who had the $110,000 in cash for the proposed Chicago purchase. Other agents testified to surveillances conducted in New York and Chicago and to the arrest

of Urbina-Astorga in Chicago.

The defense which was conducted by a court-appointed lawyer who stated at the opening of the trial that this was the first case of its kind he had handled (Tr. p. 2), was two-pronged in that Vasquez claimed to be innocent and to have been entrapped. These themes were stressed in the opening, in cross-examination, in Vasquez's testimony in his own defense, and in summation.

The cross-examination of Caracappa was grossly inept in that it called for a reiteration of the witness's direct testimony and elicited some damaging testimony by broad questions.* However, it at least established that in all the transactions with Reyes, Reyes delivered the heroin and received the money (Tr. p. 261; and compare government summation, Tr. p. 797).

*Counsel's ineptness appears from the following examples of his cross-examination of Caracappa (Tr. p. 225):

" Q. Did you ever see Juan Ramon Vasquez sell or distribute narcotics of any kind?
A. Yes, I did.
Q. You did?
A. Yes, sir.

(continued on page following)

After counsel's abortive efforts to secure the testimony of co-defendants Reyes and Lugo (described below), Vasquez testifying in his own defense, explained that he had been pressured by Fraticelli from October to December, 1976 to deal in narcotics and had always refused (Tr. p. 688). He went on to say that Fraticelli told him on December 23, 1976 that he had a big man who wanted to buy some dope. He responded that he was not selling dope; whereupon Fraticelli told him to get somebody else which Vasquez said he did in the person of Reyes (Tr. pp. 689-690). He went on to testify that Reyes did not work for him and never gave him any money. He said Reyes supplied the heroin that figures in the transactions with Caracappa (Tr. pp. 696-697). He

> Q. Will you tell us where and when?
>
> * * *
>
> A. The date was January 26, 1977, in the afternoon, where I observed Juan Ramon Vasquez hand another individual a clear plastic packet containing a brown substance in his apartment."

But see Vasquez's denial that narcotics were involved (Tr. p. 731).

Again counsel by asking what Caracappa and Vasquez had talked about at one of their meetings was told in response that Vasquez showed both agents some diluted heroin (Tr. p. 277). While the incident was not specifically denied, Vasquez maintained he never possessed heroin (Tr. p. 724).

claimed he knew none of the people in Chicago and went there because he was promised $5000 for making the trip (Tr. pp. 708, 705). The only calls he made in Chicago were to his wife and his mother in New York (Tr. p. 722, DX C). He denied having written any alias on GX 7 (Tr. p. 715). He further denied ever having anything to do with narcotics (Tr. pp. 723-724). He testified further that what he said on the tapes were exaggerations to meet what he believed were lies or exaggerations by the undercover police (Tr. p. 754, 759-760).

Despite the inconsistency between Vasquez's claims of innocence and the entrapment defense, the court, relying on United States v. Brown 544 F 2d 1155 (2 Cir. 1976), charged on entrapment (Tr. pp. 786,966). The court also charged on aiding and abetting (56 a-58 a).

The jury deliberated for an hour and one-half before finding Vasquez guilty on the conspiracy charge (Tr. pp. 989-990), and for about three hours before convicting him on the substantive counts after having submitted to it, along with a portion of Caracappa's testimony, the court's charge on entrapment and on the

elements of the substantive charges including aiding and abetting (Tr. pp. 1007, 1009, 1013, 1018-1019).

The Entrapment Defense

The claim of entrapment was based on pressure allegedly put on Vasquez from October to December, 1976 by Fraticelli who made the introduction of Detective Caracappa to Vasquez on the telephone on December 23, 1976, and the personal introduction on January 3, 1977. However, there is nothing whatsoever in the record to indicate that counsel for Vasquez made any request of the government for the production of Fraticelli. As shown below this was not a Roviaro situation and the request for Fraticelli's production should have been made and honored.

The Failure to Press for the Testimony of Co-Defendants Reyes and Lugo

Vasquez attempted to call co-defendants Reyes and Lugo to the stand as defense witnesses. Apparently counsel had a statement from Reyes exculpating Vasquez (Tr. pp. 1025-1026 - mins. of sentence). However

counsel for Reyes who had pleaded guilty to Counts 3, 4 and 5, as the court records show, announced that his client would claim his privilege because there "are still open counts to this indictment" (Tr. p. 673). Vasquez's counsel, in obvious ignorance of the practice in this Circuit of the government consenting at the time of sentence to dismissal of the open counts, made no protest or request for a further inquiry. Reyes was not called.

In connection with Lugo who was named only in the conspiracy count and had pleaded guilty thereto, that defendant's counsel stated that Lugo would claim the privilege because of outstanding charges against him in the State Supreme Court. There was no elaboration of this nor any request by Vasquez's counsel for elaboration. Lugo was sworn outside the jury's presence and announced his intention to claim his privilege, even relating to the charge on which he had pleaded guilty, if the answers would incriminate him. Vasquez's counsel acquiesced in the prospective witness being excused (Tr. pp. 676-678).

The Failure to Request an Agency of the Buyer Charge.

With regard to the transactions between Reyes and Caracappa, counsel made no request for a charge on the agency of the buyer theory; instead he tried the case in apparent ignorance of the aiding and abetting statute and without any apparent realization that an aiding and abetting charge would be given and would be fatal to his client's chances of acquittal.

POINT I

COUNSEL FAILED TO CALL FOR THE PRODUCTION OF THE INFORMANT FRATICELLI

This is not a Roviaro situation. Here the informant who was paid by Caracappa to make the introduction of the undercover detective to Vasquez (Tr. p.51) was known to Vasquez and allegedly entrapped him into the dealings in this case over a period of months (Tr. pp. 687-690 and cf. pp. 845-846). Under these circumstances it was indispensable for the government to have produced Fraticelli if a demand for his production had been made. United States v. White 314 F 2d 814 (2 Cir. 1963); Velarde-Villarreal v. United States 354 F 2d 9 (9 Cir. 1965); United States v. Clarke 220 F.Supp. 905 (E D Pa. 1963); cf. United States v. Super 492 F 2d 319 (2 Cir. 1974). However, counsel made no effort whatsoever in this connection, so this case in no way resembles United States v. Fuentes - F2d - (2 Cir.) slip op. 1397, 1402(9/14/77).

POINT II

COUNSEL ALLOWED CO-DEFENDANTS REYES AND LUGO TO AVOID TESTIFYING ON FRIVOLOUS GROUNDS

The situation with Reyes and Lugo did not present the difficult situation of a grant of immunity to defense witnesses discussed by Bazelon, C.J. in United States v. Gaither 539 F 2d 753 (D.C. Cir. 1976) cert. den. - U.S. - . Rather what was involved was a failure of Vasquez's counsel to protest the frivolous claims of privilege asserted by the prospective witnesses. This was particularly glaring in the case of Reyes because counsel had a statement from Reyes exculpating Vasquez (Tr. pp. 1025-1026 - mins. of sentence).

Reyes had pleaded guilty to counts 3, 4 and 5. The open counts were the conspiracy count and count 2 which charged a sale on January 3, 1977. But for counsel's apparent ignorance of the practice in this Circuit of the government moving to dismiss the open counts after the imposition of sentence, the matter should have been explored to the extent of bringing that practice out. Had that been done, it would have

been obvious that there was no merit whatsoever to the claim of privilege and Reyes's favorable testimony could have been adduced in Vasquez's defense. Indeed if Reyes had testified, Vasquez may not have had to take the stand.

Lugo's claim of privilege appears equally groundless. He was named only in the conspiracy count to which he had pleaded guilty. His claim of privilege was assertedly based on the fact that he had a charge pending against him in the State Supreme Court. However, counsel made no effort to ascertain the nature of that charge which may have had nothing whatsoever to do with heroin. Even if the charge involved a narcotics charge, the witness could have been protected if counsel had made an appropriate request. While there was no showing as to what Lugo would have testified to, presumably his testimony would have been helpful to the defense. Counsel's failure to press the matter did his client a great disservice and undoubtedly hampered the defense.

POINT III

COUNSEL FAILED TO REQUEST A CHARGE ON THE AGENCY OF THE BUYER THEORY

In this case where the uncontradicted evidence showed that Vasquez had no stake or interest either in the dealings between Reyes and Caracappa or in the proposed Chicago transaction (aside from the $5000 he was promised for making the trip) counsel at the very least, to avoid the disastrous impact of an aiding and abetting charge and the usual charge of conspiracy, should have requested a charge on the agency of the buyer theory. United States v. Sawyer 210 F 2d 169 (3 Cir. 1956); United States v. Moses 220 F 2d 166 (3 Cir. 1955).*

This Court has recognized the agency of the buyer theory, United States v. Valdes 229 F 2d 145 (1956) cert. den. 350 U.S. 996; United States v. Thomas 351 F 2d 538 (1965) but has not applied it because of the fact

*While counsel cited Moses in his requests to charge (doc. 9, p. 7, para. 12) he did so for a completely different point.

situations in the cases involved. However, in the case at bar the fact situation was such as to at least have justified counsel requesting a charge on the theory.

On this record all that happened in the Reyes situation is that Vasquez got Reyes to deal in narcotics at Fraticelli's suggestion after he had made it clear that he did not deal in narcotics. Thereafter Vasquez, while admittedly present at Reyes's transactions with Caracappa, had nothing to do either with the delivery of the heroin or the receipt of the money. He had no stake whatsoever in the venture.

Such a charge if requested and given, may well have led to an acquittal of Vasquez on the conspiracy charge as well as on the substantive charges. All he did in connection with the Chicago aspect in exchange for a promise of $5000, was to arrange the introduction of the agents to Aurea Vasquez who took it from there without any help whatsoever from Vasquez. He did nothing in Chicago except sleep in the hotel room and talk to his wife and mother on the telephone.

POINT IV

COUNSEL'S INEFFECTIVENESS REQUIRES GRANTING A NEW TRIAL.

Even under the farce and mockery standard which has been adhered to in thi Circuit, e.g. United States v. Bubar - F 2d -, slip. op. 415, 444, 452-6 (6/30/77) but see Judge Oakes dissenting in Rickenbacker v. Warden, 550 F 2d 62 (1976) cert. den. - U.S. -, 22 Cr.L. 4007, Vasquez should get a new trial because of the ineffectiveness of his counsel.

As noted, this was the first case of its kind counsel had tried. He made no effort to have the government produce Fraticelli. He failed to press for the testimony of at least one key defense witness, Reyes. He failed to press for a charge critical to the defense. His objection to the introduction of the tapes betrayed a lamentable ignorance of the applicable law. His cross-examination efforts served only to bring out a reiteration of the direct, and to elicit new and damaging testimony. Notwithstanding all the foregoing, the jury was impressed enough with the entrapment

argument to ask for a repetition of the charge on that subject. The defense to all of the charges might well have prevailed if counsel had taken the obvious steps that competent counsel would have taken as outlined above.

CONCLUSION

Counsel's performance in this case was a farce and a mockery of justice. Such a lack of effective assistance of counsel should shock the conscience of the Court. Accordingly the judgment below should be reversed and a new trial ordered.

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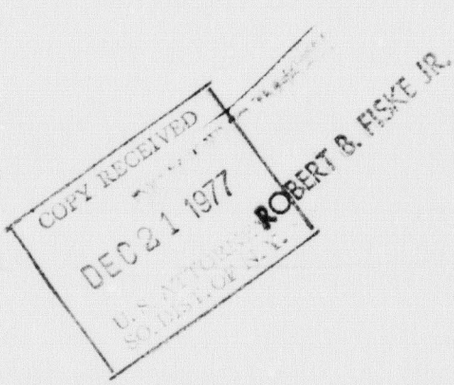
Attorney for Appellant.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